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No. 98-188

In The

Supreme Court of the United States

October Term, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,

Petitioner,

v.

L.R. WILLSON AND SONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The questions presented by the Secretary of Labor ("Secretary") are too broad. The Secretary never presented questions 1 or 3 to the Fourth Circuit Court of Appeals, the Occupational Safety and Health Review Commission ("the Commission"), or to Administrative Law Judge Nancy Spies. The only question presented is:

Whether the Secretary bears the burden of proving that a supervisor's misconduct, which results in an apparent violation of the Occupational Safety and Health Act of 1970 (the "Act" or "OSHA"), was not unforeseeable or unpreventable.

PARTIES TO THE PROCEEDING

Petitioner accurately identifies the parties to the proceeding.

L.R. Willson and Sons, Inc., a Maryland corporation, has no parent or subsidiary companies.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Secretary improperly identifies the statutory and regulatory provisions involved. No questions were presented below concerning sections 5 and 17 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 654 and 666. No questions were presented below concerning steel erection standards, or specifically, 29 C.F.R. § 1926.750(b)(1)(ii).

If any statutes or regulations are pertinent to the Secretary's petition, they are Sections 9, 10, 11, and 12 of the Act, 29 U.S.C. §§ 658, 659, 660, and 661, and the Commission's rule on affirmative defenses, 29 C.F.R. § 2200.34, reproduced *infra* at App. 1-12.

STATEMENT OF THE CASE

The Respondent is satisfied with Petitioner's presentation, except to the extent modified or supplemented as follows:

1. Petitioner states, falsely, that the Secretary characterized the sole citation as "willful" because she had "recently cited respondent for a number of alleged violations of the Act. . . . " (Pet. at 3.) On the contrary, the Secretary had withdrawn a fall protection citation against Respondent due to unpreventable employee misconduct, and the willful characterization wholly was unrelated to any earlier citations. (Pet. App. at 47a.)

2. Petitioner correctly describes the administrative law judge's ("ALJ") reasoning contained in her opinion,

but gives a patently false impression of Manley's testimony. Manley's testimony, as noted in oral argument by the Fourth Circuit Court of Appeals' panel, was not that discipline was relaxed when OSHA was not on the job. Rather, it was that Respondent was more vigilant at uncovering safety violations when OSHA was on the job, which, given the Secretary's enforcement policy and attitude, is understandable.

3. Respondent is satisfied with Petitioner's statement.

4. The Petitioner incorrectly accuses the court of appeals of commingling the issues of "knowledge" and "unpreventable employee misconduct." The court, however, treated these issues separately. (Pet. App. at 10a-12a.) The Fourth Circuit first found that the Commission improperly had shifted the burden of proving employer knowledge to the Respondent. (Pet. App. at 10a-11a.) The court then noted its disagreement with other circuits on the role "unpreventable employee misconduct" plays in the Commission's burden of proof. (Pet. App. at 11a.)

5. The Secretary never argued to the Fourth Circuit Court of Appeals that *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979), should be overruled.[1] Rather, the Secretary embraced the holding of *Ocean Electric*, which states that the Secretary must prove that a

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[1] The Secretary's Brief to the Fourth Circuit has been lodged with the Clerk of this Court.

supervisor's misconduct was not idiosyncratic or unforeseeable if the issuance of a citation solely is based on supervisory misconduct. *Id.* at 401. Because Manley forced a subordinate to violate Respondent's rules, the Secretary argued that the citation was not solely based on Manley's misconduct. (*See* Secretary's Brief to Fourth Circuit at 31-34.) The Fourth Circuit flatly rejected this argument. (Pet. App. at 11a n.28.)

Further, the Secretary never argued to the Fourth Circuit that she did not have to prove employer knowledge of a violation as part of her case-in-chief. Rather, she acknowledged that it was Commission precedent, affirmed without split in the circuits, that she must prove "the employer had knowledge or constructive knowledge of the condition." (*See* Secretary's Brief to Fourth Circuit at 28.)

REASONS FOR DENYING THE PETITION

The Secretary never raised, and consequently the court of appeals and the Commission never addressed, the core issues raised in her petition. The Secretary never questioned her burden, under Commission and federal court of appeals precedent, to prove employer knowledge of a violation of an OSHA standard when prosecuting a citation. It would be imprudent to grant certiorari as to questions 1 and 3 in the Secretary's petition. It is the Secretary, not the court of appeals, who is attempting to conflate the knowledge issue with the issue of unforeseeable employee misconduct.

The Secretary's petition is a clever ploy to reduce her burden of proof in OSHA cases, not determine what role employee misconduct plays in the burden of proof scheme.[2] The only transparent reason the Secretary's petition is before this Court is because of six words in the opinion below: "Although some sister circuits have held . . . " (Pet. App. at 11a.) If the Fourth Circuit had omitted the paragraph beginning with these words, its holding would have been the same. The Fourth Circuit would have relied upon *Ocean Electric, supra,* the case which "is clearly the law of [the Fourth] circuit," (Pet. App. at 11a-12a), and the proof issue would remain as stated twenty years earlier by the court of appeals.

The court of appeals, however, felt compelled to state – although it was not essential to the result – that unpreventable employee misconduct was not an affirmative defense, but part of the Secretary's case-in-chief. (Pet. App. at 11a.) Certainly, there is disagreement between some circuits on this issue, but the issue itself is not crucial. All the circuits agree that unpreventable employee misconduct is pertinent to a determination of an OSHA violation. *See P. Gioiso & Sons, Inc. v. OSHRC,*

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[2] The Secretary's elegant statutory argument on employer knowledge only being related to the "serious" characterization of a citation does not hold up under scrutiny. For nearly 30 years, the Secretary has borne the burden of proving employer knowledge under Commission precedent, and there is no need to disturb that precedent, especially where the question has not been presented below. *See Brennan v. OSHRC,* 511 F.2d 1139, 1143-44 (9th Cir. 1975) (burden is on Secretary to establish employer knowledge of both serious and non-serious violations of the Act).

115 F.3d 100, 109 (1st Cir. 1997); *D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984); *Ocean Electric Co. v. Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir. 1976); *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987); *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018, (7th Cir. 1975); *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir. 1978); *Brennan v. OSHRC*, 511 F.2d 1139, 1144-45 (9th Cir. 1975); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980); *Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982). This hardly presents a question so profound that certiorari must be granted, especially when the decision below expressly did not turn on that question.

The Secretary admits that the Occupational Safety and Health Administration administratively considers unpreventable employee misconduct in its decision whether to issue a citation. (Pet. at 10.) Indeed, OSHA administratively vacated a citation against Respondent because it concluded, based on its investigation, that the apparent violation had been the result of unpreventable employee misconduct. (Pet. App. at 47a.) OSHA's enforcement policy is not placed in a tailspin by requiring the Secretary, who considers misconduct before issuing a citation, to present such evidence to the Commission as part of her case-in-chief. It would, however, place OSHA's enforcement policy on its head to truncate the Secretary's burden as requested in her petition and no longer require the Secretary to prove employer knowledge of an OSHA violation in her case-in-chief.

Questions 1 and 3 presented by the Secretary have not been sufficiently addressed below. In fact, they have never been addressed by the Secretary, the Respondent, the ALJ, the Commission, or the Fourth Circuit. The Secretary's attempt to raise them here is premature and not supported by any position she has earlier taken. This Court should not, and ordinarily does not, decide questions not raised or litigated in the lower courts. *See City of Canton v. Harris*, 489 U.S. 378, 386-87 (1989); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *California v. Taylor*, 353 U.S. 553, 556, n.2 (1957).

The court of appeals applied long-standing Fourth Circuit precedent correctly, ruled in favor of Respondent, and confirmed its view that the Secretary, who conducts OSHA investigations, should bear the burden of proving that the apparent violation was not the result of unpreventable employee misconduct. Any difference in opinion among the circuits as to where the burden of proof should lie regarding unpreventable employee misconduct does not raise or create substantial questions of federal safety and health policy. This is not the appropriate case for this Court to consider the procedural niceties of the unpreventable employee misconduct issue.

CONCLUSION

Respondent respectfully requests that the Secretary's petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

STATUTORY AND REGULATORY PROVISIONS

1. Section 9 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 658, provides as follows:

§ 658. Citations.

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

2. Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659, provides as follows:

§ 659. Procedure For Enforcement.

(a) If, after an inspection or investigation, the Secretary issues a citation under Section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by

reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9 (a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9 (a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided

in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

3. Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660, provides as follows:

§ 660. Judicial Review.

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order

of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code.

(b) The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a), is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a uncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 10, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a), the court of appeals may assess the penalties provided in section 17, in addition to invoking any other available remedies.

(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

4. Section 12 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661, provides as follows:

§ 661. The Occupational Safety and Health Review Commission.

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out

the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term for six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(c)(1) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: "(57) Chairman, Occupational Safety and Health Review Commission."

(2) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph: "(94) Members, Occupational Safety and Health Review Commission."

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United State Code.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Every official act of the Commission shall be entered of record, and its hearing and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and

the person taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceedings before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

(j) An administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code.

5. The Commission procedural rule in this case, 29 C.F.R. § 2200.34, provides as follows:

§ 2200.34. Employer Contests.

(a) Complaint.

(1) The Secretary shall file a complaint with the Commission no later than 20 days after receipt of the notice of contest.

(2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place, and circumstances of each such alleged violation; and

(iii) The considerations upon which the period for abatement and the proposed penalty of each such alleged violation are based.

(3) Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought.

(b) Answer.

(1) Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.